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Draft Model Law on International Commercial Conciliation

Compilation of comments by Governments and international organizations

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* The date of submission of the document results from the dates at which comments were received by the Secretariat.

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Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group II (Arbitration and Conciliation) (hereinafter referred to as "the Working Group"), and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention (para. 109 (j)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues

under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7]

6. At its thirty-fifth session, held in vienna in November 2001, the Working Group discussed draft model legislative provisions on conciliation on the basis of the documents prepared by the Secretariat (A/CN.9/WG.II/WP.115 and A/CN.9/WG.II/WP.116). The deliberations and conclusions of the Working Group with respect to that item are reflected in document A/CN.9/506. Having completed its consideration of the substance of the provisions of the draft model legislative provisions on international commercial conciliation, the Working Group requested the Secretariat to establish a drafting group to review the entire text with a view to ensuring consistency between the various draft articles in the various language versions. The final version of the draft provisions as approved by the Working Group is contained in the annex to document A/CN.9/506, in the form of a draft model law on international commercial conciliation. The Secretariat was requested to revise the text of the draft guide to enactment and use of the model law, based on the deliberations in the Working Group. It was noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session, to be held in New York from 17 to 28 June 2002 (A/CN.9/506, para. 13.

8. In preparation for the thirty-fifth session of the Commission, the text of the draft model law as approved by the Working Group was circulated to all governments and to interested international organizations for comment. The comments received as of 12 April 2002 from five governments and one non-governmental organization are reproduced below in the form in which they were communicated to the Secretariat.

Compilation of comments

A. States

Belarus

[Original: Russian]

1. In article 1, paragraph 4 (b), after the words "If a party does not have a place of business, reference is to be made to the party's habitual residence" add "(location)". Paragraph 4 (b) would then read as follows:

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence (location)."

2. Add the following article to the draft UNCITRAL Model Law on International Commercial Conciliation:

"Conciliation shall be deemed to have been attained if the claimant has reached an agreement with the respondent (renounced the claim), the respondent has reached an agreement with the claimant (acknowledged the claim) or if the parties have reached an agreement as a result of mutual concessions. Mutual concessions with respect to the object of the dispute shall be possible if they do not contradict the imperative norms of the law and the nature of the contentious legal relationship. Mutual concessions shall also be permitted with respect to the division of the costs of the case and the time limits and procedure for the performance by the parties of the obligations that they have assumed."

Ecuador

[Original: Spanish]

1. Article X, Suspension of limitation period, which appears in document A/CN.9/506 as footnote 3 to Article 4 of the Draft Model Law and is foreseen as being optional, should be in the main part of the Model Law. Without a provision having that content, in general, for those who do not wish to adopt the aforementioned optional provision there would result an interruption of the limitation period, which, at the end of an unsuccessful attempt at conciliation, would have to start running again from day one, which would not happen if suspension was specified.

2. In Article 8 it would be better to delete the words "or a member of the panel", since they open up the possibility of one of the conciliators (where there are more than one) meeting or communicating on his/her own with the parties together or with each of them separately. Such authorization through the Model Law would not contribute to the transparency necessary as evidence of the impartiality of the conciliator, even though he/she has been designated by one of the parties.

Consequently, Ecuador considers that the original version of Article 9, the one examined by the Working Group during its 35th session, should be retained.

France

[Original: French]

Article 1. Scope of application and definitions

1. Paragraph 3

France agrees with the criterion adopted for the scope of application of the model law: by referring to intrinsic internationality, independent of any spatial criterion, it has the great merit of simplicity.

2. Paragraph 8

It is the understanding of France that the draft law, at the disposal of the parties wishing to conciliate, does not apply to conciliation at the initiative of a court. It would not, therefore, necessarily be redundant to specify such an exclusion explicitly.

Article 3. Variation by agreement

3. This article, which specifies which of the model law's provisions—of a residual nature—may not be excluded, should also cite **article 15. Enforceability of settlement agreement**. The adopted text should therefore include this additional reference.

Article 4. Commencement of conciliation proceedings

4. Including an article X as an optional article has the merit of highlighting the problematic nature of the question of the limitation period.

Article 14. Resort to arbitral or judicial proceedings

5. Paragraph 1

In the interests of giving effect to a conciliation settlement when there is an express conciliation clause, France proposes that the paragraph read as follows:

> "*Where the parties have agreed to conciliate, such an undertaking shall be given effect by the arbitral tribunal or the court until evidence is furnished that the procedure was undertaken unsuccessfully*."

Article 15. Enforceability of settlement agreement

6. As things stand, we support this provision. Indeed, France would be opposed to having an arbitral proceeding grafted onto the settlement agreement. Converting a

conciliation settlement into an arbitral award is not at all acceptable since it would amount to attaching the same status to an act between two private persons as to a court decision. There are two possibilities: either the conciliation settlement is turned into a "real" arbitral award, but here one would have to qualify the enforceability of an award as being "in due form", with the proceedings becoming far more cumbersome as a result and more expensive for the parties (thus running counter, of course, to the whole spirit of conciliation); or else there could be a kind of quasi-automatic equating of the conciliation settlement to an arbitral award, which would entail some degree of exposure to abuse since the contract (conciliation settlement) would not be subject to scrutiny by a court of the country in which the settlement is invoked except in a limited range of cases (cf. for France, article 1502 NCPC (New Code of Civil Procedure)).

In order to meet this concern, France proposes the following wording:

"*The authority of* res judicata *and/or the enforceability of such agreement shall, as appropriate, be recognized or granted by the law or the competent authority of the country in which the agreement is invoked.*"

Hungary

[Original: English]

1.) **Article 1, paragraph (6)** the parties are free to agree to exclude the applicability of the Model Law. In view of the Hungarian Party there is a need a legally binding minimum law with respect to the conciliation proceedings, which are able to ensure the equality of the parties. A permissive legislation would attenuate this precondition. If the paragraph (6) remains unchanged, an agreement has to be reached in order to ensure that the parties are permitted to exclude the applicability of the whole Law or only a certain part (some provisions) of it. The latter solution is preferable.

2.) **Article 14, paragraph (1)**

Taking into consideration the current Hungarian law on judicial procedure it is difficult to fulfil the provisions of this paragraph. Those provisions can be performed only by voluntary acceptance of the parties.

3.) **Article 15**

According to the Hungarian Act LIII of 1994 the provisions of Article 15 of the Model Law can not be applied in Hungary. The chapter II, Section 10 of that Act lays down the rule that the judicial execution shall be ordered by the issue of an executable document. Executable documents are: (i) certificate of execution issued by a court, (ii) document with a writ of implementation issued by a court, (iii) a judicial order or restraint of execution, or order of transfer, furthermore, a decree of direct court notice. The Act narrows down the number of enforceable documents. A direct enforcement of the settlement agreement can not be favoured, because it could have effects similar to the ones when declaring the direct enforcement of a contract.

A solution could be found through the conciliation-mediation proceedings which would be carried out under the auspices of a permanent court of arbitration. The Rules of procedure of the Hungarian Arbitration Court (attached to the Hungarian Chamber of Commerce and Industry) contains the following provisions: "At the joint request of the Parties the President of the Arbitration Court shall appoint the conciliator-mediator as sole arbitrator. The sole arbitrator shall render an award containing the agreement reached and signes by the parties." (52§(2) Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, effective as of September 1. 2001).

4.) Furthermore it is to be pointed out that the conversion of a settlement agreement into an arbitration award could also be reached outside of the framework of a permanent arbitration proceedings. After having reached an agreement in the course of the conciliation proceedings the parties could at the same time establish an ad hoc arbitration and appoint the conciliator as a sole arbitrator. In that case the parties are able to transform their settlement agreement into an arbitral award which can be enforced without any difficulties.

Turkey

[Original: English]

- In the 5th article of the Draft, titled "The Number of Mediators", no articles are included relating to "Joint action" of the mediation committee at the construction stage of agreement between the parties in order to ensure harmony during the mediation process, and it is considered that this will create a loophole with regard to the field of application of the law.

- It is suggested that the "obligation to keep the information relating to the mediation process confidential" included in article 10, be broadened so as to ensure that such confidentiality covers the protection of images and names and also that the trade secrets or other information are kept between the parties, in a way to include the negotiation agreement as well.

- With regard to paragraph 3 of article 11, which covers the disclosure of information and documents submitted during the mediation process, it is suggested that a phrase be inserted to this paragraph stating that the information and documents submitted in the mediation process may also be disclosed upon "approval of the parties" as well as by the order of law and in line with the application or execution of the negotiation agreement.

- In order to prevent the use of information and documents received from the parties by the mediator when fulfilling his/her duty, article 13 of the Draft stipulates that a mediator cannot act as an arbitrator in the arbitration process following the mediation process. It is suggested that the tribunal process following the mediation process also be added to this phrase along with a statement indicating that the negotiator who is banned from disclosing the information he/she acquired as per

article 11, cannot act as arbitrator or be a referee, representative or attorney to any of the parties.

- It is suggested that an article on mediation expenses be added to the Draft.

- The Draft does not include any arrangements as regards the course of the mediation process or re-election procedures in case of decease or resignation of the mediator.

B. Intergovernmental organizations

Permanent Court of Arbitration

[Original: English]

This comment deals under A. with art. 4 of the final draft of the Working Group on Arbitration (A/CN.9/506). In addition, under B. some comments are made on art. 1 in relation to the comments made on art. 4 under A.

A. Article 4

1. This article reads (emphasis added):

Article 4. Commencement of conciliation proceedings

(1) Unless otherwise agreed by the parties, the conciliation proceedings in respect of a particular dispute that has arisen commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.
(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate. (emphasis added)

It is submitted that art. 4(2) should not apply when, as normally is the case, conciliation proceedings commence on the basis of a prior agreement of the parties to conciliate (e.g., a conciliation clause in a commercial contract). The requirement of accepting the invitation to conciliate should only apply when parties have not already agreed to enter into conciliation proceedings in order to settle their dispute. In this case, the agreement of the other party is indeed required. Unlike conciliation on the basis of a prior agreement to conciliate, this rarely occurs. Inviting a party to conciliate when a dispute has arisen may be regarded by the other party as a sign of weakness.

This obstacle does not exist when parties have concluded a prior agreement to conciliate. If the parties previously agreed to resort to conciliation, no subsequent agreement to conciliate should be needed when a dispute arises. Allowing for the possibility to reject engaging in conciliation proceedings would deprive the original

agreement of any meaning. The original agreement should oblige the parties to appoint a conciliator or panel of conciliators and to have at least one meeting with the conciliator or panel of conciliators.

2. Modern Conciliation Rules provide for such consequences of an agreement to conciliate. For example, the WIPO Mediation Rules (World Intellectual Property Organization) state in art. 18:

"The mediation shall be terminated

...

iii. by a written declaration of a party at any time after attending the first meeting of the parties with the mediator...".

Similarly the Mediation Procedure Rules of the C.P.R. (Center for Public Resources, New York) Institute for Dispute Resolution state in art. 3 under (b) that a party may withdraw only

> "after attending the first session".

Also the "Guide to ICC ADR Rules" which accompanies the new ICC ADR Rules (2001) states on page 20 with respect to art. 2.A: "Where there is an agreement to refer to the Rules":

> "... parties may not withdraw from the proceedings prior to a first discussion with the Neutral".

3. Not only art. 4 but also art. 12 and art. 6 of the final draft of the Working Group will need modification if the examples mentioned under 2. are followed.

(a) Article 12

Article 12 deals with "Termination of Conciliation". According to this article: "The conciliation proceedings are terminated" on the grounds enumerated under (a)-(d). Ground (d) deals with withdrawal from the conciliation proceedings by one party "by a written declaration of a party".

The one-side withdrawal should be maintained, but should be limited to "a written declaration by one party to the other party and the conciliator or the panel of conciliators after the first meeting with them".

(b) Article 6

Article 6 deals with the "Appointment of Conciliators". This article does not guarantee that a conciliator will be appointed in all circumstances. Paragraph 4 of the article only provides for assistance by an "appropriate institute or person" when parties are looking for a suitable person to be appointed by them. However, this institute or person should also act as Appointing Authority when parties fail to agree on the appointment of the conciliator.

In order to cover the failure of the parties to appoint a conciliator, art. 6 should introduce the same fallback provision as in the UNCITRAL Arbitration Rules: appointment by an institute or person acting as Appointing Authority (A.A.). This A.A. may be agreed upon by

the parties or, if not agreed by the parties, shall be designated by the Secretary General of the Permanent Court of Arbitration.

B. Comments on Article 1 in relation to the comments made under A.

1. Article 1, paragraph 8

Article 1 on the "Scope of Application" excludes in para. 8 the application of the Model Law "when a judge or an arbitrator attempts to facilitate a settlement".

This provision acknowledges that an arbitrator may act as conciliator in order to facilitate attempts to reach a settlement. However, an arbitrator has been appointed to decide the dispute. Acting as conciliator will put the arbitrator in a delicate position if his attempt to reach a settlement fails. For example, what about the confidentiality of information received from the parties during these attempts? What about the confidentiality of acknowledgments made by parties in the course of the conciliation if the arbitral proceedings continue because no settlement has been reached? There also is the risk that the arbitrator might be challenged if, during the conciliation intermezzo, the arbitrator in the view of one of the parties, may not have acted impartially. It, therefore, is submitted to delete "or as arbitrator" in para. 8 of art. 1.

The Model Law excludes a conciliator from acting as arbitrator unless otherwise agreed by the parties (art. 13). A similar exclusion should be made for an arbitrator acting temporarily as conciliator. It, therefore, is submitted to exclude in an additional article the arbitrator from acting as conciliator, unless otherwise agreed by the parties.

In arbitration practice it does indeed occur that parties request the arbitrators, who are already well-informed about the case, to assist them in attempts to conciliate. Arbitrators should refrain from accepting such an invitation. Instead, the arbitrators could suspend the arbitral proceedings for a short period and recommend the parties to resort to conciliation under well-drafted Conciliation Rules with the assistance of a third party, well trained in conciliation.

In view of the authority of an arbitral tribunal, the parties may be well inclined to accept this recommendation. If the attempt to reach a settlement were to be successful, the arbitral tribunal could, on request of the parties, incorporate the settlement in an award on agreed terms. See further my *Quo Vadis Arbitration?* (1999) 372-374.

2. Article 1, paragraph 7

Paragraph 7 of art. 1 makes the Model Law applicable in several cases "subject to the exclusion as provided in paragraph (8)". The Model Law applies first of all to a conciliation agreement between the parties "whether reached before or after a dispute has arisen". The conciliation agreement has been discussed above, under A. According to para. 7, the Model Law applies as well:

(a) In case an obligation to conciliate is established by law

This makes the Model Law, when transformed into national law, applicable to an obligation to conciliate, established in another national law. The current version of the draft, requiring a subsequent agreement of the parties to engage in conciliation proceedings when a dispute has arisen, should not apply in case the law obliges to conciliate.

(b) In case a direction or suggestion of a court, arbitral tribunal or competent government entity has been made

The court

When conciliation has been directed by a court, this should not be frustrated by a party rejecting to engage in conciliation proceedings.

The arbitral tribunal

The same applies when the arbitral tribunal may have directed or suggested that the parties should enter into settlement negotiations.

A competent governmental entity

Also in this case a direction by this entity should not be frustrated by a party rejecting to engage in conciliation proceedings.

Ad (a) and (b)

In all these cases conciliation will take place without a previous agreement of the parties to conciliate. Moreover, in all these cases a conciliator or conciliators should be appointed and a first meeting with the conciliator or conciliators has to take place before a party can withdraw from the conciliation proceedings.

Under the Model Law the same conciliation regime should apply to the situation described under A. as well as B.

Conclusion

The draft Model Law on International Commercial Arbitration, as submitted to the Commission for approval, should be modified along the lines as suggested under A. When this is done, the same regime will apply to conciliation under a previous agreement to conciliate and to conciliation taking place in the cases mentioned under B.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[2] Ibid., paras. 340-343.

[3] Ibid., paras. 344-350.

[4] Ibid., paras. 371-373.

[5] Ibid., paras. 374 and 375.

[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[7] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.